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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1938 MISC.

UNITED STATES OF AMERICA *ex rel.*,
ROBERT JAMES LONG,

Petitioner,

v.

FRANK J. PATE, Warden,
Illinois State Penitentiary,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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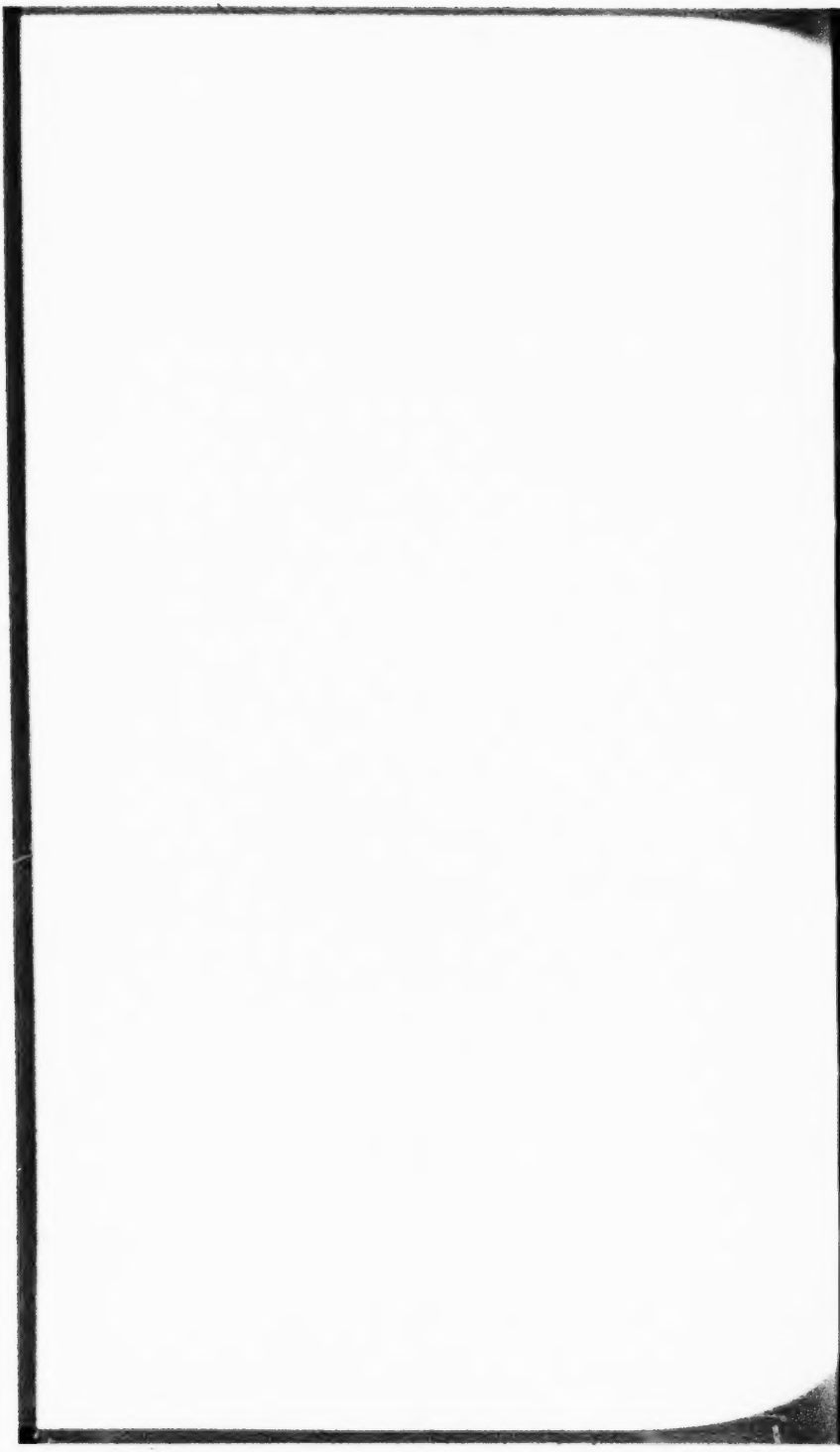

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Robert James Long, an indigent, confined in the Illinois State Penitentiary, respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The amended opinion of the Court of Appeals is reported at 418 F.2d 1028, and appears in the Appendix hereto.

JURISDICTION

The original judgment of the Court of Appeals was entered November 18, 1969. A timely petition for rehearing was denied December 31, 1969, and an amended opinion was filed January 8, 1970. This petition for *certiorari* is filed within 90 days of denial of rehearing. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Was petitioner deprived of Federal constitutional rights when a state court imposed a severe 50 year sentence for burglary after taking into consideration untried indictments then still pending before the same court over the objection of defense counsel that there were witnesses to the untried charges who were not called at the burglary trial because "we are trying to try these cases one at a time"?

STATEMENT OF THE CASE

Convicted of a burglary, which had taken place when he was only twenty-one, petitioner was sentenced to a minimum of 15 and a maximum of 50 years. A co-defendant, petitioner's uncle, who was convicted of the same burglary was only sentenced to a term of 5 to 10 years. In imposing the more severe sentence upon petitioner the trial judge clearly stated that he was influenced by untried charges of resisting arrest during which two policemen were slightly wounded. The trial judge, over defense objections, took into account the untried

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offenses even though those indictments were still pending before him. (For transcript of the sentencing proceedings see Supplemental Record, Petitioner's Exhibit B, Tr.267-281, hereafter cited as "Tr.".)

At sentencing petitioner explained to the trial judge that because of the pending indictments he had been unable to testify at his trial for burglary. He had intended to testify but

> I couldn't do that because they would question me about the shooting and therefore, I would have been in effect telling the State's Attorney what my defense for the shooting was. That is why I couldn't take the stand and testify. (Tr.270-271)

Nevertheless, the trial judge later stated that he would consider the "shooting" for which petitioner was still under indictment in imposing sentence. He told defense counsel:

> . . . I think you are forgetting that the Court did permit the testimony to go into the record, and the Court feels rightfully so, of the shooting of the police officers. . . . And this Court is taking that into consideration. (Tr. 272)

Defense counsel responded that he did not believe it was proper to take that into consideration:

> We admit there were police officers shot but the Court doesn't know that we don't have some type of defense to that. We had witnesses to the shooting which we did not bring in because they weren't proper on this [trial for burglary]. (Tr. 273)

Defense counsel also appealed to fundamental fairness noting that defendant was still under indictment for the other offenses:

> *We are trying to try these cases one at a time because if we don't, we will be carried away.* I believe this is very prejudicial and I do think your honor is wrong in allowing these things to sway him. (Emphasis added).
>
> The Court: I am permitting the shooting to have some influence in my sentence.... (Tr. 274)

After exhausting available state remedies petitioner turned to the United States District Court for the Northern District of Illinois with a petition for habeas corpus *in forma pauperis.* Regarding the sentencing procedure he urged that the trial judge's consideration of the untried indictments violated his Federal constitutional rights. (R. Item 15, pp. 2-3) The District Court ruled:

> The indictments that petitioner is referring to are those for resisting arrest. In Illinois, evidence of resisting arrest is admissible at a trial (*People v. Wright,* 30 Ill. 2d 519, 198 N.E. 2d 316, *cert. denied* 379 U.S.11; *People v. Sustak,* 15 Ill. 2d 115, 153 N.E. 2d 849 (1959); so certainly like evidence would be admissible at a presentence hearing where rules of evidence are not as strict as at trial. (R. Item 22, p.3)

A certificate of probable cause to appeal *in forma pauperis* was issued and before the Court of Appeals for the Seventh Circuit petitioner again urged that he was denied basic constitutional rights when the state imposed a sentence which took into account untried offenses for which he had been indicted but not convicted. Reliance was placed upon recent decisions which establish that state sentencing procedures must comply with the fundamental requirements of due process. See, *e.g., Specht v. Patterson,* 386 U.S.605 (1967). Petitioner also stressed

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that in *Williams v. New York*, 337 U.S.241 (1949), where neither appellant nor his counsel had disputed the other offenses or asked the sentencing judge to disregard them, this Court still found that "a serious and difficult question" was presented. Although this Court had warned in the *Williams* case, 337 U.S. at 252, that "the sentencing procedure is [not] immune from scrutiny under the due process clause", the Court of Appeals did not discuss whether the sentencing procedure followed in this case violated Federal due process. Like the District Court it merely concluded that the untried indictments could be taken into consideration under Illinois law. Its entire resolution of the issue is contained in the following paragraph:

> Appellant also contends that during the hearing in aggravation and mitigation of sentence the trial court improperly considered two untried indictments against him. Although appellant had not pleaded guilty to the two indictments, Illinois law provides, among other things, that for the purpose of determining sentence to be imposed, the court shall, after conviction, consider the evidence, if any, received upon trial, and shall also hear and receive evidence, if any, as to the moral character, life, family, occupation, and criminal record of the offender, and may consider such evidence in aggravation or mitigation of the offense. Ill. Rev. Stat., Ch. 38 §1-7(g) (1967). Since evidence of appellant's resisting arrest and subsequent flight to New Mexico, the subject matter of the two untried indictments was admitted at appellant's trial, it was properly considered by the trial court at the hearing in aggravation and mitigation. (See pp. 4-5 of Appendix hereto; and 418 F.2d at 1031).

REASONS FOR GRANTING CERTIORARI

THE DECISION BELOW THAT A STATE MAY IMPOSE A SENTENCE WHICH TAKES INTO CONSIDERATION UNTRIED INDICTMENTS FOR OFFENSES WHICH THE DEFENDANT HAS NOT ADMITTED CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

The transcript of the sentencing proceeding in this case (Pet.Ex.B, Tr.267-281) clearly establishes that the trial judge imposed a severe fifty-year sentence for burglary because he was influenced by offenses for which petitioner had been separately indicted but not tried or convicted. Both petitioner and defense counsel explained their dilemna to the trial judge. If petitioner had testified at the burglary trial the state would have learned about his defense to the untried indictments. Moreover, defense counsel explained at sentencing that "We had witnesses to the shooting which we did not bring in because they weren't proper on this [trial for burglary] . . . We are trying to try these cases one at a time because if we don't we will be carried away." (Tr.273,274)

In the decision below the Court of Appeals did not consider whether the sentencing procedure followed in this case violated any of petitioner's constitutional rights, but merely held that under Illinois law, evidence of the untried offenses "was properly considered by the trial court at the hearing in aggravation and mitigation." (See pp.4-5 of Appendix hereto). This decision, we respectfully submit, clearly conflicts with recent decisions in which this Court has established that state sentencing procedures must satisfy the requirements of due process. See, *Specht v. Patterson*, 386 U.S. 605 (1967); *Oyler v. Boles*, 368 U.S. 448 (1962); *Williams v. Oklahoma*, 358 U.S. 576 (1959); *Williams v. New York*, 337 U.S. 241 (1949).

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In *Williams v. New York, supra,* this Court observed that:

> The accuracy of the statements made by the [sentencing] judge as to appellant's background and past practices was not challenged by appellant or his counsel; nor was the judge asked to disregard any of them or to afford appellant a chance to refute or discredit any of them by cross-examination or otherwise. (337 U.S. at 244)

Nevertheless, the Court noted that "The case presents a serious difficult question" (337 U.S. at 244), and at the end of its opinion warned that "What we have said is not to be accepted as holding that the sentencing procedure is immune from scrutiny under the due process clause." (337 U.S. at 252) Subsequently, in *Williams v. Oklahoma, supra,* 358 U.S. at 580-81 n.5, and *Oyler v. Boles, supra,* 368 U.S. at 450-451, 453, the Court emphasized that due process was not violated because the defendants had *admitted* the other offenses which were considered in imposing sentence.

Here, however, the trial judge imposed a sentence based on untried offenses knowing that the other indictments were pending before him (Tr.250), and that defense counsel had indicated that he had witnesses to those offenses who were not called because he "was trying to try these cases one at a time." (Tr.273-274) Under these circumstances, the trial judge could have easily deferred sentence on the burglary conviction until trial of the pending indictments, and after petitioner had been afforded an opportunity to present his defense to those charges a fair sentence could have been imposed in regard to the burglary conviction. Instead, he took the untried offenses into account and imposed a very severe sentence. The state then failed to prosecute the other

indictments leaving no doubt that the sentence imposed for the burglary conviction was deemed sufficient to cover the untried offenses. In the process, petitioner was in effect sentenced for crimes for which he was never tried, and was deprived of his constitutional right to a trial and to present a defense on the untried indictments.

Petitioner earnestly asked the Court of Appeals to measure the sentencing procedure in his case against the judicial yardstick of fundamental fairness required by due process of law. His request was summarily rejected without explanation. He therefore respectfully renews that request before this Court.

In the recent decisions previously mentioned, this Court has started to articulate the factors which will be considered in deciding whether a particular sentencing procedure satisfies the requirements of due process of law. Similarly, associations of trial judges, the Model Penal Code, the American Law Institute, and legal scholars have all suggested changes designed to insure that sentencing better complies with the fundamental requirements of fairness and due process than is presently the case. See, generally, K.C. Davis, *Discretionary Justice, A Preliminary Inquiry*, pp.133-141 (1969). We respectfully request that *certiorari* be granted because the decision below reveals a callous insensitivity to these salutary developments.

CONCLUSION

For these reasons, a writ of *certiorari* should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Glenn Dale, Md. 20769
Counsel for Petitioner

March 31, 1970

AMENDED OPINION

In the United States Court of Appeals For the Seventh Circuit

SEPTEMBER TERM, 1968 — APRIL SESSION, 1969

No. 17282

UNITED STATES *ex rel.*, ROBERT JAMES LONG,
Petitioner-Appellant,
v.
FRANK J. PATE, Warden,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 8, 1970

Before CUMMINGS and KERNER, *Circuit Judges*, and WISE, *District Judge*.

WISE, *District Judge*. This is an appeal from an order of the District Court denying appellant's application for a writ of habeas corpus. The District Court granted appellant a certificate of probable cause to appeal in forma pauperis.

Appellant alleges that his 1953 conviction for burglary and 1963 conviction for aggravated kidnapping and armed robbery were a violation of the United States Constitution. The convictions were affirmed by the Illinois Supreme Court in *People* v. *Anderson*, 17 Ill. 2d 422 (1959)[1] and *People* v. *Long*, 39 Ill. 2d 40 (1968).

[1] At the time of his 1953 conviction appellant was known as Robert Anderson.

1953 CONVICTION

In support of his application for a writ of habeas corpus appellant presents the following questions for determination with regard to his 1953 conviction:

1. Whether comments made by appellant to a policeman while traveling on a train from New Mexico to Chicago constituted a post-indictment confession;

2. Whether *Massiah* v. *United States*, 377 U.S. 201 (1964) is retroactive and applicable to the facts of this case;

3. Whether the admission of a co-defendant's redacted confession deprived the appellant of a fair trial;

4. Whether evidence that the appellant resisted arrest was properly considered by the trial judge in fixing sentence; and

5. Whether the Illinois Supreme Court improperly refused to consider appellant's petition for a reduction in sentence.

After fleeing the jurisdiction appellant was located in New Mexico and in November, 1952 officer Ferguson was dispatched to return him to Chicago for trial. The return trip consisted of a 24 hour train ride, during which appellant and the officer engaged in conversation. Appellant contends he was interrogated by the officer, that he was permitted less than five hours sleep at intermittent intervals and was informed he would be given a Fifth District Lie Detector Test, which both knew to mean a physical beating. Fearing for his safety appellant confessed to Ferguson. Thus, appellant alleges that his confession was not a free and voluntary act.

At appellant's trial Ferguson testified as follows:

> "I said to Robert that he appeared to be very intelligent and that he had a good mind, apparently. I said, 'Why don't use you use it for something other than the theft you have chosen?' And he said to me that he was a burglar, that he intended being a burglar and a good one. I said, 'Well, if you're going to be, you could be a good one, or you should want

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to be a good one, but I can't see why you wouldn't rather say be a minister or a businessman of some type.' And he said 'Well, my business is burglarizing.'"

Appellant never challenged this conversation at his trial as being the result of police coercion or misconduct of any kind. Furthermore, in his hearing before the Illinois Supreme Court appellant simply denied that the conversation ever took place. *People* v. *Anderson, supra.* It now appears that appellant concedes the conversation did take place, but alleges that it was the product of duress and was elicited in violation of *Massiah* v. *United States, supra.*

Since the appellant's conviction became final before May 18, 1964, the date of the Supreme Court ruling in *Massiah,* the issue presented is whether *Massiah* should be given complete retroactive application. Basing our decision on the extent which the condemned practice "infects the integrity of the truth-determining process," *Johnson* v. *New Jersey,* 384 U.S. 719, 729 (1964), and weighing such finding "against the prior justified reliance upon the old standard and the impact of retroactivity upon the administration of justice," *Stovall* v. *Denno,* 388 U.S. 293, 298 (1967), we agree with the other circuits which have faced the question of *Massiah's* retroactivity, and hold it to be not retroactive. *United States ex rel. Romano* v. *Fay,* 360 F. 2d 389 (2nd Cir., 1966), cert. denied sub nom. *Romano* v. *Follette,* 385 U.S. 1020 (1966); *Lyles* v. *Beto,* 363 F. 2d 503 (5th Cir. 1966).

Appellant's constitutional challenge with regard to the admission of the confession of Braxton Anderson, appellant's uncle, at their joint trial in 1966 is predicated on *Bruton* v. *United States,* 391 U.S. 123 (1968). In *Bruton,* the Supreme Court held that admission into evidence of a co-defendant's confession at a joint trial in which the co-defendant did not take the stand denied the defendant his constitutional right of confrontation. In the present case appellant did not move for a severance in the trial court, despite the fact that he was informed prior to trial of the existence of his uncle's statement. In *Bruton* a severance was requested and denied. This case is also

distinguishable from *Bruton*, because a third co-defendant took the stand, admitted his part in the crime and implicated appellant. This co-defendant was subjected to extensive cross-examination by counsel for appellant, and it was at that time that the state introduced the statement of appellant's uncle. It is also important that unlike *Bruton* appellant's name was deleted from the statement. In light of the foregoing it is the conclusion of this court that the rule set forth in *Bruton* v. *United States, supra*, was not violated at appellant's trial, and that he was not denied his right of confrontation.

Appellant also contends that the failure of the trial judge to give a limited instruction that the confession of appellant's uncle, Braxton Anderson, at their joint trial in 1966 should be considered only against Anderson and not against the appellant, was violative of appellant's sixth amendment right of confrontation. We agree with appellant's contention that the failure of the trial judge to give a limited instruction was error. Cf. *Bruton* v. *United States*, 391 U.S. 123 (1968). We find, however, that in light of appellant's own confession which was admitted into evidence and the testimony of one Carl Wilson establishing the petitioner's possession of the stolen property, the trial judge's error was harmless and does not require reversal. See *Harrington* v. *California*, 395 U.S. 250 (1969), *Chapman* v. *California*, 386 U.S. 18 (1967).

Appellant also contends that during the hearing in aggravation and mitigation of sentence the trial court improperly considered two untried indictments against him. Although appellant had not pleaded guilty to the two indictments, Illinois law provides, among other things, that for the purpose of determining sentence to be imposed, the court shall, after conviction, consider the evidence, if any, received upon trial, and shall also hear and receive evidence, if any, as to the moral character, life, family, occupation, and criminal record of the offender, and may consider such evidence in aggravation or mitigation of the offense. Ill. Rev. Stat., Ch. 38 § 1-7(g) (1967). Since evidence of appellant's resisting arrest and subsequent flight to New Mexico, the subject matter of the two untried indictments was admitted at appellant's

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trial, it was properly considered by the trial court at the hearing in aggravation and mitigation.

Appellant's final contention is based on the fact that at the time the Illinois Supreme Court reviewed his 1953 conviction, it lacked the power to reduce the sentence without reversing the conviction. Courts are now empowered to reduce an excessive sentence without reversing the conviction, Ill. Rev. Stats., Ch. 38, § 121-9(4); Supreme Court Rule 615, but appellant contends the Illinois Supreme Court refused to permit him to file a petition for reduction. In light of the fact that the Illinois Supreme Court has already held that appellant's sentence was not excessive and was within the range established by the legislature, *People* v. *Anderson, supra,* this court will not now question the trial judge's discretion in imposing sentence, nor will it question the refusal of the Illinois Supreme Court to reconsider appellant's petition for reduction of sentence. See *United States* v. *Pate,* 357 F. 2d 911 (7 Cir. 1966).

1963 CONVICTION

In 1963 the appellant was convicted by a jury in the Circuit Court of Cook County of armed robbery and aggravated kidnapping. On this appeal he alleges that certain incidents occurred during his trial which deprived him of a fair trial, and also violated his privilege against self-incrimination. These same allegations were made on appeal to the Supreme Court of Illinois, and were rejected. *People* v. *Long, supra.*

During appellant's trial a prisoner escaped from the "bullpen" adjoining the courtroom, causing a disturbance which the appellant alleges deprived him of a fair trial, since he was ordered removed from the courtroom while the disturbance was quelled. A presiding judge must see that the proceedings are conducted in an orderly manner, and the control of the conduct of the trial rests with his discretion. *People* v. *Arnold,* 248 Ill. 169 (1910); *People* v. *Richardson,* 17 Ill. 2d 253 (1959). The appellant should establish that the trial judge abused his discretion in ordering the appellant's temporary removal from the courtroom. *DeWolf* v. *Waters,* 205 F. 2d 234 (10th Cir., 1953). No such abuse has been shown.

The appellant raises further questions regarding the comments of the trial court which were considered by the Illinois Supreme Court in detail, and concluded that such comments complained of were provoked by the appellant's own conduct.

A police officer testified that he did not know who took a watch from defendant's arm, and yet the defendant repeatedly asked him the same question. The state objected to defendant's arguing with the witness, and the objection was sustained. The defendant then argued that the Officer testified he saw the watch taken off but could not say who removed it. The Judge then replied, "Well, you tell the jury then. Come on, lets have another question." The defendant did not object to this remark nor did he raise it as an error in his written motions for judgment notwithstanding the verdict and for a new trial, but argues on appeal that his constitutional right to remain silent was thereby violated.

The appellant next complains of a comment by the court in the jury's presence that the prosecutor was "magnanimous" in offering to supply defendant with his pretrial conference notes. No objection was made at the trial as to this comment and the question was not raised in the motion for judgment notwithstanding the verdict or for a new trial. In fact, after the prosecutor offered the notes to the appellant, the appellant stated that he was very fortunate in being able to receive them.

The final contention concerns the court's statement that he would have stopped appellant's questioning sooner if he had been a lawyer.

Constitutional questions can be and are waived unless asserted at the trial, *People* v. *Bruckman*, 33 Ill. 2d 150 (1965), and when the appellant failed to object to the comments at the time they occurred and failed to raise the objection in a written motion for a new trial they are deemed waived. *People* v. *Serrano*, 32 Ill. 2d 84 (1965); *People* v. *Donald*, 29 Ill. 2d 283 (1963); *People* v. *Armes*, 28 Ill. 2d 83 (1963). The fact that the defendant was appearing *pro se* cannot be used as an excuse for failing to object, since counsel had been appointed to advise him. *People* v. *Richardson*, 17 Ill. 2d 253 (1959).

Under the facts of this case, the district court properly denied appellant's petition for writ of habeas corpus.

The Court expresses its appreciation to Joseph A. Marino, a member of the [redacted] bar, for his excellent services as court-appointed counsel for the appellant.

AFFIRMED

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

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